

# RULE XII

## EQUAL OPPORTUNITY

### 12.01—ORGANIZATION AND METHOD OF OPERATIONS

#### 12.011

Organization - the RI General Law 28-5.1, regarding Equal Opportunity and Affirmative Acton Policy, establishes the Rhode Island State Equal Opportunity Office and sets forth its procedures and authority

#### 12.012

Function - It is the function of the Rhode Island State Equal Opportunity Office to enforce the Law which prohibits discrimination because of race, color, religion, sex, age, national origin, handicap or sexual orientation, in the field of employment in Rhode Island State Government.

#### 12.013

Method of Operation - The Office accepts, from both State employees and applicants for State employment, complaints of discrimination that are based on race, color, sex, religion, age, national origin, handicap, sexual orientation or sexual harassment. The Office will investigate the allegations and shall make every effort by informal conference, conciliation and persuasion to achieve compliance. When these methods do not resolve a charge or complaint the Office will conduct a formal hearing.

### 12.02—DEFINITIONS - WHERE USED IN THESE RULES AND REGULATIONS

#### 12.021

The term "Law" shall mean RI General Law 28-5.1 on Equal Opportunity and Affirmative Action.

#### 12.022

The term "Executive Order" shall mean the Governor's Executive Order on Sexual Harassment

#### 12.023

The terms "Charge or Complaint" shall mean a written allegation of a Civil Rights Violation, filed with the RI State Equal Opportunity Office, by an individual stating that (s)he has been discriminated against by reason of race, color, religion, sex, age, national origin, handicap, sexual orientation or sexual harassment.

#### 12.024

The term "Civil Rights Violation" shall refer to any discriminatory acts or practices.

#### 12.025

The term "Administrator" shall mean the Administrator of the Rhode Island State Equal Opportunity Office.

12.026

The term "Office" shall mean the Rhode Island State Equal Opportunity Office.

12.027

The term "Department" shall mean an agency in Rhode Island State Government.

12.028

The term "Complainant" shall mean an individual filing a complaint of alleged discrimination in accordance with the Law or Executive Order.

12.029

The term "Respondent" shall mean a person or agency against whom an alleged charge or complaint is filed in accordance with the Law or Executive Order.

12.0210

The term "Hearing Officer" shall mean the person authorized by the State Equal Opportunity Office to conduct formal hearings regarding alleged Civil Rights Violations, filed with the RI State Equal Opportunity Office.

12.0211

The term "Discrimination" shall mean:

(a) prejudice or prejudicial outlook, action or treatment toward individuals who are not equally considered for appointments, promotions, transfers, training and work assignments based on race, color, religion sex, age, national origin, handicap, sexual orientation or sexual harassment.

(b) a violation of any state or federal nondiscrimination statute, regulation, or executive order.

## 12.03—PRACTICE BEFORE THE STATE EQUAL OPPORTUNITY OFFICE

12.031

Any person may appear before the Office in his/her own behalf. Except as may otherwise be provided by law, no person may appear in a representative capacity before the Office other than (a) attorneys-at-law duly qualified and entitled to practice before the Supreme Court of the State of Rhode Island, (b) attorneys-at-law duly qualified and entitled to practice before the highest court of any other state, to appear in a representative capacity before administrative agencies of such other state, (c) such other persons as by law are expressly authorized to appear in representative capacities, and, (d) a bona fide officer of the agency (respondent) if the Office deems appropriate and is not otherwise prohibited by State Law.

12.032

All persons appearing in proceedings before the Office in a representative capacity shall conform to the standards of ethical conduct required of attorneys before the courts of Rhode Island. If any such person does not

conform to such standards, the Office may decline to permit such person to appear in a representative capacity in any proceeding before the Office.

## 12.04—CHARGE

### 12.041

#### Who May File

State employees and applicants for state employment may file a charge at any time within ten (10) working days of the knowledge of the alleged incident of discrimination. If the alleged violation is of a continuing nature, the date of occurrence may be any date subsequent to the commencement of the violation up to and including the date on which it shall have ceased.

### 12.042

#### Form

A charge shall be in writing and signed by the complainant using the form supplied by the RI State Equal Opportunity Office.

### 12.043

#### Contents

A charge shall be in such detail as to substantially apprise the Office of the time, place, and facts with respect to the alleged violation. It should contain the following:

- (a) The full name, address and telephone number of the person making the charge.
- (b) The name and address of the State Agency, persons against whom the charge is made.
- (c) A statement of facts alleged to constitute the violation, including the date, time, and place thereof.
- (d) A statement describing any other action instituted by/on behalf of the complainant in any other form.

### 12.044

#### Acceptance of Charge

- (e) The Office shall accept for, hearing any charge which it receives from an individual in compliance with the foregoing provisions of this article.
- (f) In the event the Office receives a written statement from an individual which does not comply substantially with Sections 4.02, 4.03 hereof, the Office may accept and docket the statement as an unperfected charge. The Office shall notify the complainant in writing of the elements which must be supplied to perfect the charge. If the individual fails or refuses to perfect the charge as specified, the charge may be dismissed.

### 12.045

#### Amendment

A charge or any part thereof, may be amended by the complainant to cure technical defects or omissions, or to clarify or amplify allegations made therein, or to set forth additional facts or allegations related to the subject matter of the original charge, such amendments shall relate back to the

original filing date.

#### 12.046

##### Withdrawal of Charge

A charge or any part thereof, may be withdrawn by the complainant at any time. A complainant's request to withdraw a charge shall be in writing, signed, and witnessed. The Office shall approve the request if it is knowingly and voluntarily made, and shall promptly so notify all parties in writing.

### 12.05—PROCEDURE UPON CHARGE

#### 12.051

##### Docketing and Service of Charge

Each charge, once fled, shall be docketed and assigned a case number by the Office. The respondent shall be notified within five (5) days following the date of filing. The complainant will be notified that the charge is being processed

#### 12.052

##### Maintenance of Records

Notwithstanding any other provision of these rules and regulations, once a charge has been served on a respondent, the respondent shall preserve all records and other evidence which may be relevant to the case until the matter has been finally resolved.

#### 12.053

##### Investigation

After a charge has been filed, the Office staff shall institute an investigation to ascertain the facts relating to the civil rights violation as alleged in the charge and any amendments thereto. During the investigation of a charge, the administrator or office employee supervising the investigation may request the attendance of witnesses or the production for examination and copies of any books, records or documents

#### 12.054

##### Determination After Investigation

(a) Report - After investigations of a charge, a report inclusive of all facts findings and recommendations will be prepared and submitted to the Administrator for determination of probable cause.

(b) Dismissal - If there is no conclusive evidence of probable cause, a written notice dismissing the case will be sent to all interested parties.

(c) Substantial Evidence - If probable cause of a civil rights violation is evident, the Office will serve notice of such determination advising both parties that conciliation efforts will take place.

(d) Conciliation - The Office will proceed to conciliate the settlement of the charge and prevent the repetition of future civil rights violations. If an agreement is not reached, a forma hearing will be scheduled.

### 12.06—CONDUCT OF HEARING

All hearings shall be held pursuant to Chapter 35 of Title 42 of the Rhode Island General Laws.

## 12.07—FORMAL HEARINGS

The respondent to a complaint may file a written answer to the complaint, appear at the hearing, give testimony and be represented by counsel and may obtain from the Office, a subpoena for any person or for the production of any evidence pertinent to the proceedings. The complainant must be present at the hearing and may be represented by counsel.

### 12.071

The Hearing Officer from the RI State Equal Opportunity Office shall hear the case and make a decision based on the evidence presented thereto. The Hearing Officer shall not be bound by the formal rules of evidence governing courts of law, but shall permit reasonable direct and cross examination and the submission of briefs. Testimony at the hearing shall be taken under oath and recorded by tape or otherwise.

### 12.072

Sequence of the Hearing

- (a) Introduction of the Hearing Officer
- (b) Administration of oath to the parties and witnesses
- (c) Complainant's Presentation
- (d) Respondent's Presentation
- (e) Complainant's closing statements
- (f) Respondent's closing statements

### 12.073

Appearance

The complaint must be present at the hearing and may present testimony or evidence and may either in person or by counsel, examine or cross-examine witnesses. If after receiving proper notice, the complainant does not appear at the hearing the complainant may be dismissed

### 12.074

Continuation and Adjournment

The Hearing Officer or administrator may continue or adjourn the hearing to a later date.

### 12.075

Improper Conduct

The Hearing Officer may exclude from the hearing room or from further participation in the proceedings any person that engages in improper conduct. Exceptions to this are only a party or his/her attorney or a witness engaged in testifying.

### 12.076

Sequestering Witnesses

The Hearing Officer may sequester witnesses from the hearing until the time of their testimony.

## 12.077

### Findings

If the Hearing Officer finds from the evidence that the respondent has engaged in a discriminatory practice, (s)he shall make written findings of fact, conclusion of law and the decision. Within five (5) days after the decision of the Hearing Officer, the Office shall inform the parties of record of the decision. As part of its order, the Office may require the respondent to pay actual damages to the complainant and to take such affirmative action as the Hearing Officer considers necessary, including a requirement for reports of the manner of compliance.

If the Hearing Officer finds from the evidence that the respondent has not engaged in a discriminatory practice, the Office shall make written findings of fact and serve the complainant and respondent with a copy of the findings of fact and with an order dismissing the complaint.

## 12.08—GUIDELINES ON DISCRIMINATION BECAUSE OF SEXUAL HARASSMENT

### 12.081

Harassment on the basis of sex is a violation of Executive Order No. 85-13. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or reflection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

### 12.082

In determining whether alleged conduct constitutes sexual harassment, the State Equal Opportunity Office will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts on a case by case basis.

### 12.083

The appointing authority is responsible for the acts of its agents and supervisory employees with respect to sexual harassment, regardless of whether the specific acts complained of were authorized or even forbidden by the appointing authority and regardless of whether the appointing authority knew or should have known of their occurrence. The State Equal Opportunity Office will examine the circumstances or the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

12.084

With respect to persons other than those mentioned in paragraph (c) of this section, an appointing authority is responsible for acts of sexual harassment in the workplace where that appointing authority or its agents or supervisory employees knows or should have known of the conduct. An appointing authority may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action.

12.085

Prevention is the best tool for the elimination of sexual harassment. An appointing authority should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing the employees of their right to raise and how to raise the issue of harassment, and developing methods to sensitize all concerned.

12.086

An employee wishing to file a charge of sexual harassment will use the "Discrimination Grievance Procedure" established by the State Equal Opportunity Office.

12.09

I. Equal opportunity and affirmative action toward its achievement is the policy of all units of Rhode Island state government, including all public and quasi-public agencies, commissions, boards and authorities; and in the classified, unclassified and non-classified services of state employment; provided that the mandatory provisions of this section shall not apply to the legislative branch of state government.

II. This act does not guarantee employment of minorities, but it provides the appointing authority with the increased opportunity, to originally or promotionally appoint qualified minorities from an eligibility list. Original appointment is defined as the process applicable to initial entrance into state service. Promotional appointment is defined as the process applicable to the upward nobility opportunity for existing state employees. A minority is currently defined in federal employment law as Blacks, Hispanics, American Indians, including Alaska Natives, and Asians including Pacific Islanders. H-8005 affords the opportunity for the authorization of a supplemental certification process whenever there exists a "manifest imbalance" in a particular job category. "Manifest imbalance" is defined meaning there is an underrepresentation of minorities based on a demographic analysis.

III. The State Equal Opportunity Administrator shall serve as the Chief Executive Officer of the State Equal Opportunity Office and shall be responsible for monitoring and enforcing all equal opportunity laws, programs and policies within State government.

IV. No later than July 1st each department or agency excluding the legislative branch of state government, shall submit to the State Equal Opportunity Office and the House Fiscal Advisor sufficient data to enable the State Equal Opportunity

Office and the House Fiscal Advisor to determine whether the agency achieved the hiring goals contained in its affirmative action plan for the previous year. If the hiring goals contained in the previous year's plan were not met, the agency shall also submit with such data a detailed explanation as to why the goals were not achieved.

V. The State Equal Opportunity Administrator will initiate a complaint against any agency excluding the legislative branch, who fails to comply with the provision set forth in Section I. Whenever the Equal Employment Opportunity Administrator initiates such a complaint, he or she shall cause to be issued and served in the name of the Equal Opportunity Office, a written notice, together with a copy of such complaint requiring that the agency, administrator, agent or employee respond thereto and appear at a hearing at a time and place specified in such notice. The Equal Opportunity Office shall follow its lawfully adopted rules and regulations concerning hearings of discrimination complaints.

VI. A final order of the Equal Opportunity Office shall constitute an "order" within the meaning of Section 42-35-1 (j) of the general laws; shall be enforceable as such; shall be rendered in accordance with Section 42-35-12 of the general laws; and shall be subject to judicial review in accordance with Section 42-35-15 of the general laws.

VII. The Office of Personnel Administration shall take positive steps to insure that the entire examination and testing process, including the development of job specifications and employment qualifications, is free from either conscious or inadvertent bias and shall review all recruitment or promotional procedures for all State agencies covered by this chapter for compliance with federal and state law, and bring to the attention of the Equal Opportunity Administrator matters of concern to its jurisdiction.

VIII. The Personnel Administrator may use open continuous competitive tests to establish lists and fill vacancies where there is a manifest imbalance of minorities in the job category.

IX. A minority is eligible for a promotional examination if they are currently employed in state service as of the official closing date of the examination announcement or twenty-one (21) calendar days prior to the first phase of the examination, whichever is later, and is a qualified exam applicant seeking entry into a classification where there is a manifest imbalance in the job category. This section shall not be applicable to the Rhode Island State Police or the legislative branch of state government.

X. The Office of Labor Relations shall propose in negotiations the inclusion of affirmative action language suitable to the need for attaining and maintaining a diverse workforce.

XI. There is hereby created a five (5) member committee which shall monitor negotiations with all collective bargaining units within State government specifically for equal opportunity and affirmative action interests. The members of that committee shall include the Director of the Rhode Island Commission for



Human Rights, the Equal Opportunity Administrator, the Personnel Administrator, one (1) member of the House of Representatives appointed by the Speaker, and one (1) member of the Senate appointed by the Senate Majority Leader. The initial meeting shall be called by the Equal Opportunity Administrator. The committee shall elect a chairperson who shall preside over said committee.

XII. The Appointing Authority, along with the certification of the Equal Opportunity Administrator and the Personnel Administrator, shall determine job categories for which there exists a "manifest imbalance." These job categories are defined in the Agency Affirmative Action Plan and identified with the proper job category code in the Official State Classified and Unclassified Pay Plan.

XIII. At least seven (7) days prior to certifying names under this Section, the Appointing Authority shall post a notice of intention to do so in the offices of the Personnel Administrator and of the Equal Opportunity Administration and shall make a copy of such notice to the applicable union, if any, with instructions to post copies of such notice at all locations where persons whose names may be certified under the provisions of this Section may, if employed, be assigned.

XIV. Supplemental Certification in the civil service is created to eliminate the overall adverse impact of systemic barriers to the employment of minorities as a protected class, and the Office of Personnel Administration shall provide all appointing authorities the necessary flexibility to remedy the effects of systemic discriminatory practices.

XV. A Supplemental Certification List of minorities may be called for in addition to the appropriate employment or promotion list, except in the following instances:

- (1) The absence of statistical data or reasonable evidence to show significant past discrimination or patterns of possible discrimination and/or adverse impact on the protected classes;
- (2) The presence of at least one minority ranked among the three persons standing highest on the list of persons certified by the Personnel Administrator for the position in question;
- (3) The absence of any minorities on the appropriate list; or
- (4) Any instance in which the department or agency is subject to a contradictory or inconsistent court order.

XVI. Supplemental Certification, based on race or color as a protected class, shall be made by an appointing authority whenever:

- (1) The appointing authority shall make requisition to fill one (1) or more positions wherever a manifest imbalance is identified within the department's Affirmative Action Plan.
- (2) Eligible minorities must have passed an examination for classification being recruited and/or other list deemed appropriate by the Personnel Administrator.
- (3) In certifying names for appointment to a classification for which supplemental certification being recruited, the Personnel Administrator shall include upon the applicable list the names of six (6) persons certified pursuant to this section.

XVII. Whenever an agency is seeking supplemental certification, they shall indicate

said desire on appropriate forms seeking eligibles to the Office of Personnel Administration.

XVIII. The State Equal Opportunity Administrator shall develop and implement recruitment plans to assure that adequate consideration is given to minority applicants for all positions wherein no list exists in those job categories where a manifest imbalance exists, excluding those job categories in the legislative branch of government.

12.10—Equal Employment Opportunity

(a) Retaliation or Coercion

Any employee or agent of state government who shall discriminate against an individual through the use of retaliation, coercion, intimidation threats or other such action because such individual has filed a complaint, testified or participated in any way in any investigation, proceeding or hearing regarding discrimination in employment or public service, or because such individual has opposed any act made under the Americans with Disabilities Act (ADA) or under Rhode Island Fair Employment Practices Act or any rules regulations issued pursuant to either, shall be subject to disciplinary action. Said action may include suspension from employment or dismissal where the discrimination is found to be willful or repeated.